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IN THE

**Supreme Court of the United States**

—————TERM, 1944

NO. 250

C. B. KENNEMER, ET AL, *Petitioners*

VS.

C. B. BILLINGTON, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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IN THE  
**Supreme Court of the United States**

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**NO.**—————  
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C. B. KENNEMER, ET AL, *Petitioners*

VS.

C. B. BILLINGTON, ET AL, *Respondents*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

—————

*To The Honorable, The Supreme  
Court of the United States:*

Now come C. B. Kennemer, for himself and as Community Survivor of the Estate of his deceased wife, Lottie Kennemer, and as Guardian and next friend of his daughter, Frances Kennemer, and of his grandchildren, James W., Joe Beth and Idas Ray Alexander, minors; Martie Miller and husband, Anson Miller, and Earl Alex-



ander, father of said infants, James W., Joe Beth and Idas Ray Alexander, hereinafter called Petitioners, and, petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

### STATEMENT OF THE CASE

On October 28, 1929, C. B. Kennemer and wife, Lottie Kennemer, and for many years prior thereto, were the owners in fee simple of approximately 210 acres of land in Wood County, Texas, which they occupied as their homestead. All of said land, with the exception of 40 acres, was the community estate of the said C. B. and Lottie Kennemer. On about said date of October 28, 1929, a purported mineral deed was executed by them to C. D. Davis, an agent of Respondents. Lottie Kennemer died August 18, 1942.

On January 2, 1943, by their first amended original petition, the said C. B. Kennemer and the heirs of Lottie Kennemer filed their suit in the United States District Court for the Eastern District of Texas against Respondents, seeking to cancel the mineral deed above referred to, for the reason that the deed was executed in blank, in that (1) there was no grantee named in the deed at the time of its execution, (2) there was no description of the property purported to be conveyed, and (3) neither of the Kennemers appeared in person before a notary public to acknowledge the same.

Respondents answered this petition and denied the allegations of the Kennemers, specifically pleading that the deed was in all things regular at the time it was executed; that if this mineral deed when executed was in blank, as alleged by Petitioners, that they had no notice thereof and that they were therefore innocent purchasers; that if the deed was so executed, which they denied, that it was subsequently filled in in accordance with the directions of the said Kennemers. That if said deed was so executed, that they were purchasers in good faith, without fraud, paying a valuable consideration therefor, and that said deed was binding and operative according to its provisions; that if said deed was executed as alleged by petitioners, that it was subsequently ratified by an instrument dated July 14, 1942; that petitioners having long recognized, ratified and confirmed the validity of this mineral deed and having induced respondents to believe in and rely upon its validity and having failed to undertake to disaffirm the same within a reasonable time, were estopped from attacking same.

The cause was tried before the Honorable Randolph Bryant, United States District Judge for the Eastern District of Texas, on February 16, 1943, without the services of a jury, and upon the conclusion thereof and on February 26, 1943, the court made the following findings of fact and conclusions of law:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW (R. 238-245)

This cause, having been tried before the Court without the intervention of a jury, and the Court having heard and considered the pleadings, evidence, and argument of counsel, finds the facts, and states the conclusion of law, as follows, to-wit:

### FINDINGS OF FACT

1. On October 28, 1929, plaintiff, C. B. Kennemer, and his wife, Lottie Kennemer (now deceased), were the lawful owners, in fee simple title, of the following described land and premises, to-wit:

FIRST TRACT: Situated in Wood County, Texas a part of the Manuel Y'Barbo League and Labor Grant, in the Northwest portion of a certain 200 acre tract of land which was conveyed by Conde and H. W. Reguet on May 27, 1850, and BEGINNING on the W B L of the said 200 acre tract at the S. W. corner of a 10 acre tract owned by the Estate of A. J. French, deceased, said corner being 357 feet (128.5 vrs.) South of the N W corner of the said 200 acre tract, this corner being at the N W corner of said Kennemer's fence; THENCE S. along and with a fence on the W. B. L. of said 200 acre tract, 1325 feet (477 vrs.) a stake near fence corner North, South and East; THENCE N. 88 deg. 50' E. 1362 feet (490.5 vrs) to a stake near fence corner at the western terminus of a lane, being the N. W. corner of a tract now owned by Lemuel C. Darby; THENCE

N. 0 deg. 28' W 1294 feet (465.8 vrs); THENCE N. 89 deg. 52' W 1351.5 feet (486.5 vrs) to the place of beginning, containing 40.78 acres.

SECOND TRACT: Situated in Wood County, Texas, BEGINNING at the N. W. corner of the Joseph Knight Survey on the E B L of the Manuel Y'Barbo Survey, said corner being in the intersection of rods North, South and East, THENCE N. 89 deg. 40' E. along with the N B L of the said Knight Survey, and along road 1325 feet (477 vrs) to a stake at the South edge of the road, being the N. W. corner of lands now owned by E. L. Faulk; THENCE S. 0 deg. 45 E. along and near the fence line 1667 feet (600.1 vrs) to a stake at the S W corner of the Faulk tract, about 3 feet East of the S. W. corner of the fence; THENCE N. 89 deg 30' E. 1326 feet (477.4 vrs) to a stake on the East side of a ditch and about 30 feet E. of the S. E. corner of the fence; this being a Southeast corner of the Faulk land; THENCE N. 210 feet (75.6 vrs) to a stake at the South end of an old lane; THENCE S. 89 deg. E. along old road, and approximately 24 feet south of and parallel with the fence, 1049 feet (377.6 vrs) to a stake, being the NW corner of the T. D. Yates tract of land; THENCE S. 0 deg. 11' West, 1491 feet (536.8 vrs) to Yates' S W corner on the S B L of the said Knight Survey, a stake at corner of fences, North, East and West; THENCE N. 89 deg. 45' W. along said boundary line and with a fence, 1028 feet (370.1 vrs) to a stake, a large rock pile at the N W corner of the fence; THENCE S. 213 feet (76.7 vrs) to a stake at the S E corner of the fence; THENCE S. 89 deg. W. 865 feet (311.4 vrs) to a stake at fence corner East, West and North, being the most northerly S E corner of a cer-

tain tract of 31.3 acres which was conveyed by C. B. Kennemer and wife to T. R. Lloyd on the 29th day of December, 1919, the said tract being later acquired by T. Gilbreath; THENCE N. 4 deg. 15' West 483 feet (173.9 vrs) to the N E corner of the said tract deeded by Kennemer to Lloyd; THENCE South 89 deg. West near a fence, 1798 feet (647.3 vrs) to the N W corner of the said tract deeded by Kennemer to Lloyd on the E B L of the Y'Barbo Survey, a stake near the West side of the road; THENCE N 0 deg. 0' East with the E B L of the Y'Barbo Survey and the West Boundary Line of the Knight Survey, 2721 feet (979.6 vrs) to the beginning, containing 161.65 acres; 157.35 acres being on the Knight Survey and 4.3 acres on the Townsend Survey.

2. On the date aforesaid the said Lottie Kennemer owned an undivided one-half interest in the land hereinbefore described as First Tract as her separate and individual property and estate. The remaining undivided one-half interest in said First Tract, and all of the land hereinbefore described as Second Tract, constituted the community property and estate of the said C. B. Kennemer and wife, Lottie Kennemer.

3. The land and premises above described constituted the homestead of C. B. Kennemer and wife, Lottie Kennemer, on October 28, 1929, and continued to be their homestead until the death of the said Lottie Kennemer in August, 1942. Since her death plaintiff, C. B. Kennemer, has continued to reside upon said land.

4. On October 28, 1929, the said C. B. Kennemer and wife, Lottie Kennemer, made, executed, and delivered unto C. D. Davis a deed of conveyance wherein and whereby said grantors sold and conveyed unto said grantee an undivided one-half interest in and to all the oil, gas and other minerals in and under and that may be produced from the above described land and premises, subject to any valid lease of prior date, but covering and including one-half of the rentals and royalties payable under the terms of said lease, and containing covenants of general warranty. Said deed was prepared upon a printed form, but prior to the execution and acknowledgment thereof by the grantors the various blanks contained in said printed form were duly filled in, including the names of the grantors and grantee, a complete description of the property affected, the interest therein conveyed thereby, and a recited consideration.

5. The grantors, C. B. Kennemer and wife, Lottie Kennemer, appeared before W. C. Stevenson, a duly qualified and acting Notary Public in and for Wood County, Texas, for the purpose of acknowledging the aforesaid conveyance. Thereupon said Notary Public duly took the acknowledgements of each of said grantors to said conveyance in the manner provided by the Statutes of Texas for husband and wife, and duly so certified to same, as reflected by the certificate of acknowledgment affixed to said deed.

6. After execution and acknowledgment of said deed same was duly delivered and thereupon the grantee, C. D.

Davis, paid to the grantors, C. B. Kennemer and wife, for such conveyance, a consideration of One Thousand Fifty (\$1,050.00) Dollars in cash, which was a good and sufficient consideration.

7. The terms and provisions of said conveyance truly and correctly reflect the agreement and understanding of both grantors and grantee respecting the sale of said property, with the exception that said deed recites only the payment of a nominal consideration of Ten (\$10.00) Dollars. No fraud was alleged or proven to have been practiced upon the grantors in any particular whatsoever respecting said transaction.

8. C. B. Kennemer and wife, Lottie Kennemer, recognized and confirmed the validity of said conveyance by their subsequent acts and conduct, as evidence of which:

(1) In the year 1940 they refunded one-half of the cash consideration theretofore paid them to T. A. Wright, Lessee in an oil and gas lease executed by them covering said land and premises, when the Lessee directed their attention to the fact that they had previously conveyed an one-half interest in the oil and gas rights thereunder by virtue of the aforesaid conveyance to C. D. Davis; and

(2) By the execution, acknowledgment, and delivery by the said C. B. Kennemer and wife, Lottie Kennemer, of an instrument dated July 14, 1942, purporting to correct the description of the land and premises affected by said conveyance previously executed by them in favor of

C. D. Davis, dated October 28, 1929, wherein it is recited that said previous conveyance "remains and is in full force and effect".

9. The acknowledgments of said grantors to said instrument dated July 14, 1942, was duly taken by W. D. Suiter, a duly qualified and acting Notary Public of Wood County, Texas, in the manner prescribed by the Statutes of Texas for husband and wife, and so certified by said Notary Public. The said Lottie Kennemer did not state or indicate to the said Notary Public that she had unwillingly executed or acknowledged such instrument.

10. No claim or contention was made by C. B. Kennemer and wife, Lottie Kennemer, that said conveyance which they had executed in favor of C. D. Davis, dated October 28, 1929, was in any wise invalid or irregular previous to the death of the said Mrs. Lottie Kennemer in August, 1942, and until shortly before the institution of this suit, and no repudiation or renunciation of said conveyance was undertaken by any one until shortly before the institution of this suit.

11. The defendants, C. B. Billington and J. C. Gilbreath, had previously engaged C. D. Davis to procure for them the oil, gas, and mineral interest evidenced by said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of the said C. D. Davis, dated October 28, 1929, and pursuant thereto the said C. D. Davis sold and transferred said interest unto the said



C. B. Billington by conveyance and assignment dated October 29, 1929, for which the said Billington and Gilbreath paid to the said C. D. Davis the sum of One Thousand One Hundred Fifty-five (\$1,155.00) Dollars in cash, same being a good and sufficient consideration.

12. Until immediately prior to the institution of this suit none of the defendants had any notice or knowledge of any claim or contention that said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of C. D. Davis, dated October 28, 1929, was invalid or irregular in any respect.

13. A producing oil well was completed upon the land involved in this cause in June, 1942, same being the discovery well in the area in which said land is situated. Since said date four additional producing oil wells have been completed upon said lands involved herein.

14. Mrs. Lottie Kennemer died intestate in Wood County, Texas, in August, 1942. The plaintiffs herein constitute her surviving heirs at law.

15. The oil, gas, and mineral, and royalty interests covered and affected by said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of C. D. Davis, dated October 28, 1929, are now held and owned by the defendants herein.

## CONCLUSIONS OF LAW

1. The oil, gas, and mineral, and royalty conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of C. D. Davis, dated Oct. 28, 1929, is in all things valid and binding, according to the terms and provisions therein contained.

2. The defendants are the lawful owners and holders, in fee simple, of an undivided one-half interest in and to the oil, gas and minerals in and under and that have heretofore been and may hereafter be produced from the land and premises hereinbefore described, together with the proportionate part of the royalties and rentals accruing from any valid lease covering and affecting such undivided interest.

3. That plaintiffs shall recover nothing by this suit and judgment be entered accordingly.

DATED, this the 26th day of February, A. D. 1943.

(S) RANDOLPH BRYANT,  
Judge.

Filed Feb. 26, 1943.

Petitioners perfected their appeal to the United States Circuit Court of Appeals, and on March 28, 1944, that Court affirmed the court below (R. 253). They seasonably filed their petition for rehearing, which was denied without written opinion on May 2, 1944. By successive stays of mandate, the United States Circuit Court of Appeals

for the Fifth Circuit has stayed all proceedings on its judgment pending this petition for certiorari.

### STATEMENT AS TO JURISDICTION

This case originated in the District Court of the United States for the Eastern District of Texas upon Petitioners' complaint seeking to cancel an alleged mineral deed purported to have been executed in favor of C. B. Billington, J. C. Gilbreath, Grace Gilbreath, Edith Gilbreath and Frances Gilbreath, all residents of the State of Oklahoma, which said mineral deed purported to convey a mineral interest under lands situated in the Eastern District of Texas; that all of the Petitioners reside in the State of Texas and in the Eastern District of Texas.

That upon a trial of said case, judgment was entered in said District Court of the United States for the Eastern District of Texas, denying the relief sought by your Petitioners. That from said judgment they duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which said Court affirmed the judgment of the trial court. That they duly and seasonably filed their petition for rehearing, which was overruled by the Circuit Court of Appeals.

Jurisdiction of this case is conferred upon the Supreme Court of the United States by Section 347-a, U. S. C. A., Title 28, and by sub-section 3 of Paragraph 5(b)

of Rule 38, Court Rules of the Supreme Court of the United States.

### QUESTION PRESENTED

Whether a mineral deed upon lands constituting the homestead of husband and wife is a valid conveyance when executed in blank, with no grantee, no description of the property sought to be conveyed and not acknowledged before a notary public, as provided by the Constitution and laws of the State of Texas.

### REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In holding that a deed executed as set out in the above question is valid or might be made valid by subsequent acts and laches on the part of the alleged executors of such deed, the United States Circuit Court of Appeals decided an important question of law in conflict with the Constitution, the statutes and the settled doctrine of the Supreme Court of Texas, and particularly in conflict with Section 52, Article 16 of the Constitution of the State of Texas, and Articles 1288, 1300, 3995 and 6605 of Vernon's Annotated Texas Statutes, and contrary to the well settled rule of decisions of the Supreme Court of the State of Texas as portrayed in *Robertson et al vs. Vernon et ux*, 12 S. W. (2d) 991, and in conflict with the decision of this Honorable Court contained in *Drury vs. Foster*, 2 Wall. 24, 23, 17 L. Ed. 780.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify to this Court for its review and determination on a date certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket, *No. 10,674 C. B. Kennemer, et al, Appellants, vs. C. B. Billington, et al, Appellees*, and that the judgment of the Circuit Court of Appeals and that of the trial court may be reversed and that judgment be entered cancelling the mineral deed alleged to have been executed by the Petitioners to the Respondents; and that your Petitioners have such other relief in the premises as this Honorable Court may deem proper.

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